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CASE # _____

In The Supreme Court Of The United States

ARTURO ARIZAGA RAMOS,

PETITIONER,

v.

DISTRICT DIRECTOR, EXECUTIVE OFFICE FOR IMMIGRAITON REVIEW, OFFICE OF IMMIGRATION JUDGE

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
with APPENDIX

JAMES JOSEPH LYNCH, JR
ATTORNEY AT LAW SBN 85805
2740 HOWE AVE.
P. O. BOX 336
SACRAMENTO, CA 95812-0336
OFFICE: (916) 448-7871
FAX: (916) 448-0549

COUNSEL FOR PETITIONER
ARTURO ARIZAGA RAMOS

39PP

THE QUESTIONS PRESENTED FOR REVIEW

Whether, in light of *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) and *Matthews v. Diaz*, 426 U.S. 67, 77 (1976), among others, *Reno v. American-Arab Anti-Discrimination committee*, 42 L.Ed.2d 929 (1999) is distinguishable in that the latter case, dealt with illegal aliens whereas in this case Petitioner, as a legal resident alien with minimum constitutional guarantees of due process such that IIRIRA is unconstitutional:

(i) where the manner in which bail, detention and the respect for court's orders regarding stays are concerned in light of the 8th Amendment, as construed by this Court making the provision on prohibition against excessive bail applicable to legal resident aliens in *Stack v. Boyle*, 342 U.S. 1, 4 (1951); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950)?.

(ii) in denying appeal, *habeas corpus*, judicial review or a challenge to the law in view of *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Traux v. Raich*, 239 U.S. 33, 39 (1915); *Takahashi v. Fish & Game Commission*, 334 U.S. 419, 420 (1948); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976)); *Mothers & Children's Rights Organization v. Sterrett*, 467 F.2d 797 (7th Cir., 1972); *Yee-Litt v. Richardson*, 353 F.Supp. 996 (1973), judgment *affirmed* 412 U.S. 924?

(iii) in mandating deportation of a resident legal aliens on the mere finding of being an "aggravated felon" without an affording the alien an opportunity to show factors in mitigation, or other good cause in defense of deportation as denying due process rights of legal resident aliens in view of *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) and *Matthews v. Diaz*, 426 U.S. 67, 77 (1976); *Procunier v. Martinez*, 416 U.S. 396 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana* (1976) 428 U.S. 325, 333-334; *Baldwin v. Alabama*, 105 S.Ct. 2127 (1985); *Sumner v. Shuman*, 483 U.S. 66 (1987); *Solem v. Helm*, 463 U.S. 277 (1983?

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CASE # 99-16047

In The Supreme Court Of The United States

ARTURO ARIZAGA RAMOS,

PETITIONER

vs.

DISTRICT DIRECTOR, EXECUTIVE OFFICE FOR IMMIGRAITON REVIEW, OFFICE OF IMMIGRATION JUDGE

RESPONDENT

PETITION FOR CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

There is no published opinion in this case.

The memorandum of the Ninth Circuit is set forth at p. A1 of the appendix. The order denying rehearing and rehearing en banc is set forth at page A5. The Ninth Circuits temporary stay of deportation pending hearing is set out at page A6. The order of the Ninth Circuit granting stay until mandate is set out at page A8. The Ninth Circuit's De Leon decision is set out at page A9. The decision of the INS pretermitting all legal issues in the administrative hearing is set forth at page A11.

JURISDICTIONAL STATEMENT

1. The decision of the Ninth Circuit affirming the district court was filed on November 15, 1999. Page A1

2. Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc* on December 8, 1999.[1]

[1] "Unless the time is shortened or extended by order or local rule ... in a civil case, if the united States or its officer or agency is a party, the time within

3. The Ninth Circuit denied the petition for rehearing and suggestion for rehearing *en banc* on January 12, 2000. Page A5.

4. Petitioner believes that 28 U.S.C. § 1254(1) and 2101(c) and Supreme Court Rule 13.1 probably confer *jurisdiction* on this court because the petition seeks review of an action within 90 days of the entry of an order denying a petition for rehearing.

STATUTORY PROVISIONS INVOLVED

The applicable constitutional and statutory provisions involved in this case are set forth in the appendix beginning at page A.

IIRAIRA eliminated former section 212(c) relief and in its place permits the Attorney General to "cancel removal" of inadmissible or deportable permanent residents. IIRAIRA § 304(a)(3) creating INA § 240A(c). The applicant must:

1. Have been a permanent resident for at least five years

2. Have continuously resided in the U.S. for seven years after having been "admitted in any status," and

3. Not have a conviction for an aggravated felony.[2]

There is no judicial review for persons convicted of an aggravated felony. 8 U.S.C., § 1252(a)(2)(C).

IIRAIRA permits aliens an opportunity to appeal, judicial review, habeas corpus relief, and expedited judicial proceedings to challenge the constitutionality of IIRAIRA, but denies this opportunity to those convicted of certain specified felonies denominated 'aggravated' felonies. IIRAIRA § 304(a)(3) creating INA § 240A(c) [8 U.S.C., § .1252(b).]

JURISDICTION OF DISTRICT COURT

Jurisdiction of the district court was invoked under 28 U.S.C. § 1331, and 1361, and Constitution, Art. I, § 9, restricting suspension of writs of habeas corpus, invoking the habeas corpus power of the

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which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends time." FRAP, Rule 40(a)(1).

[2] The relevant offense in this case is § 241(a)(2)(B) (controlled substance offences and drug abuser)

district court under 28 U.S.C., § 1651, the All Writs Act, for redress of denial of procedural and substantive due process rights arising under the 1st and 5th Amendments.

STATEMENT OF THE CASE

A. HISTORY OF THE CASE

On April 19, 1999, Appellant filed a complaint for *habeas corpus* relief, etc, and a TRO staying deportation until the court had an opportunity to rule on the merits.

The parties stipulated to a briefing schedule, however the court vacated that, set its own briefing schedule, with a hearing set on the merits and on the TRO for May 25, 1999. The Court then vacated the hearing and took the matter under submission, and entered its order denying preliminary injunction. Appellant timely appealed, and now brings this petition.

B. HISTORY OF BAIL ISSUE

Immediately after filing the Notice of Appeal in the District Court on 5/26/99, Petitioner filed an Emergency Motion under Circuit Rule 27-3 for stay pending appeal in the Ninth Circuit. On May 27, 1999, the court, relying on DeLeon v. INS, 115 F.3d 643 (9th Cir. 1997), App., p. A9, granted a temporary stay of deportation. App. P. A . On October 28, 1999, the court granted the motion for stay until the mandate in the case issued. App. P. A6.

Relying on the order to stay deportation, petitioner did not report for deportation on June 1, 1999. On June 16, 1999, INS sent the obligor under the bond a Notice of Immigration Bond Breach. Exh. 3b, Emergency Motion filed 11/24/99. On September 30, 1999, INS denied petitioners motion for relief under the bond based on good cause in view of the Ninth Circuit stay. Id, Exh. 4. Subsequently, petitioner's father's home was levied on for the bond amount. On November 2, 1999, Petitioner filed a timely Notice of Motion for reconsideration. Id, Exh. 5. Petitioner was orally advised no action would be taken on the last motion.

On November 24, 1999, Petitioner filed another Emergency Motion for sanctions and other relief based on INS's violation of the Stay order. The motion was denied without opinion. App. p. A4.

C. SUMMARY OF THE FACTS ON MERITS

Plaintiff was born on January 25, 1972, Guadalajara, Jalisco, Mexico. On or about November 7, 1977, at about age 5-1/2, plaintiff was brought to this country by his parents, with his two siblings. Plaintiff has resided continuously since in the United States, taking only one two-week vacation in 1992 or 1993 to visit Mexico. He is a lawful permanent resident (LPR).

Plaintiff completed elementary school in or around 1985. While in high school, plaintiff attended Yuba College on a ROP program for welding trades He dropped out of high school in or around 1990 to go to work to help with the family finances.

In 1993, Plaintiff suffered a conviction for violation of Section 493 of the California Penal Code, receiving stolen goods, and placed on probation.

Plaintiff worked for Speckles Sugar from 1990 to mid 1995.

In November 18, 1994, Plaintiff married Emilie (nee Garcia) Ramos.

On December 5, 1994, Plaintiff was arrested for violation of Section 11378 of the Health and Safety Code, sales, a felony. Defendant was convicted on July 28, 1995, and eventually released on parole June 20, 1997. His conviction is, under IIRAIRA, a defined "aggravated felony."

At the time of his release, there was an INS hold for deportation under INA § 240A(a), that mandates deportation for aliens having been convicted of an aggravated felony, as defined, to wit a conviction under California Health and Safety Code, § 11378, without an opportunity to show factors in mitigation permitting the alien to remain within the United States.

Plaintiff timely filed an application for cancellation of removal from the United States with the Immigration Court, and on November 18, 1998 said court ordered Plaintiff removed from the United States to Mexico, and his application for removal under section 240A(a) was pretermitted, i.e. the court declined to rule on the merits of the application. EOR, p. 12; App., p. A11. An Appeal of the decision was due on or before Friday, December 18, 1998. On Monday, December 14, 1998, Plaintiff mailed a notice of appeal, the applicable check for filing fee. EOR, p. 14. The appeal was

received by the INS Court's mailroom on Monday, December 21, 1998. EOR, pp. 15 & 16. On December 29, 1998, the Office of the Clerk, Board of Immigration Appeals, acknowledged receipt for the appeal. EOR, p. 16. On March 12, 1999, The Board of Immigration Appeals found that the appeal was untimely the decision final, and returned the file to the Immigration Court without further action. EOR, p. 17. Thereafter, Petitioner filed for habeas corpus relief in the District Court.

Plaintiff's spouse, parents, and siblings all still lawfully reside in the United States.

C. SUMMARY OF RELEVANT IIRAIRA

Sec. 304 of Subtitle A, of Title III, established a single "removal" hearing in place of the former separate deportation and exclusion hearings. It defined "removable" as deportable or excludable.

The section also amended hearing procedures, including eliminating the requirement that notices be provided in English and Spanish. It reduced the mandatory period between notice of hearing and date of hearing to 10 days. Merits hearings may take place in person or by videoconference, or, with the consent of the alien, by telephone. An alien who fails to appear is ineligible for relief (voluntary departure, cancellation of removal, adjustment, change of nonimmigrant classification, registry) for 10 years. An applicant for admission has the burden of proving eligibility for admission "beyond doubt." An alien who is not an applicant for admission must prove, by clear and convincing evidence, lawful presence pursuant to a prior lawful admission. The INS retains the burden to establish by clear and convincing evidence that the alien is deportable.

The section also codified the Executive Office for Immigration Review's new motion to reopen and reconsider regulations, limiting such motions in time and number. It also requires the Attorney General to define "frivolous behavior" of attorneys for which they may be sanctioned, and provides for the alien and the INS to stipulate to an order of removal, which is a "conclusive determination" of removability.

IIRAIRA eliminated former section 212(c) relief and in its place permits the Attorney General to "cancel removal" of inadmissible or deportable permanent residents. IIRAIRA § 304(a)(3) creating INA § 240A(c). The applicant must:

1. Have been a permanent resident for at least five years;

2. Have continuously resided in the U.S. for seven years after having been "admitted in any status," and

3. Not have a conviction for an aggravated felony.[3]

There is no judicial review for persons convicted of an aggravated felony. 8 U.S.C., § 1252(a)(2)(C).

IIRAIRA permits aliens an opportunity to appeal, judicial review, habeas corpus relief, and expedited judicial proceedings to challenge the constitutionality of IIRAIRA, but denies this opportunity to those convicted of certain specified felonies denominated 'aggravated' felonies. IIRAIRA § 304(a)(3) creating INA § 240A(c) [8 U.S.C., § .1252(b).]

SUMMARY OF ARGUMENT IN SUPPORT OF REVIEW

(i) The IIRIRA is unconstitutional, on its face, or as applied to legal resident aliens in the manner in which bail, detention and the respect for this court's orders regarding stays are concerned in light of the 8th Amendment, as construed by this Court making the provision on prohibition against excessive bail applicable to legal resident aliens in *Stack v. Boyle*, 342 U.S. 1, 4 (1951); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950).

(ii) The IIRIRA is unconstitutional, on its face, or as applied, in denying appeal, judicial review or a challenge to the law in view of *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (Businesses; municipal ordinance unconstitutional); *Traux v. Raich*, 239 U.S. 33, 39 (1915) (Employment; restriction unconstitutional); *Takahashi v. Fish & Game Commission*, 334 U.S. 419, 420 (1948) (Fishing rights); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (Federal employment for legal resident aliens); *Mothers & Children's Rights*

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[3] The relevant offense in this case is § 241(a)(2)(B) (controlled substance offences and drug abuser)

Organization v. Sterrett, 467 F.2d 797 (7th Cir., 1972); *Yee-Litt v. Richardson*, 353 F.Supp. 996 (1973) [Rejecting the fact-policy distinction; pre-termination argument required prior to termination of benefits], judgment *affirmed* 412 U.S. 924.

(iii) The IIRIRA is unconstitutional, on its face, or as applied, in mandating the deportation of resident legal aliens on the mere finding of being an "aggravated felon" without an affording an alien to show factors in mitigation, or other good cause in defense of deportation as denying due process rights to the legal resident alien under the 1st and 5th Amendments, as protected by procedural due process under the 5th Amendment in view of *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) and *Matthews v. Diaz*, 426 U.S. 67, 77 (1976); *Procunier v. Martinez*, 416 U.S. 396 (1978) (1st Amendment; Communications; Family Rights); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana* (1976) 428 U.S. 325, 333-334; *Baldwin v. Alabama*, 105 S.Ct. 2127 (1985) (Statute saved because after jury imposition of death penalty, judge weighed aggravating and mitigating circumstances to determine whether or not penalty would in fact be imposed); *Sumner v. Shuman*, 483 U.S. 66 (1987) (Applies to Prisoners who, serving life for murder, are convicted of killing a fellow inmate; deterrence value rejected; narrow class of cases rejected); *Solem v. Helm*, 463 U.S. 277 (1983)(Will not foreclose the possibility for rehabilitation): 24B C.J.S., Criminal Law § 1974, at n. 5.5 (Banishment is punishment); 3 Rotunda, Treatise On Constitutional Law § 22.5 (Involuntary Expatriation Impermissible.).

Conclusion. Based upon the foregoing, this court should grant the writ of certiorari, and reverse summarily and remand for further consideration, or set the matter for briefing and argument on the merits.

ARGUMENT IN SUPPORT OF REVIEW

I

THE DISTRICT COURT AND NINTH CIRCUIT HAVE DECIDED IMPORTANT QUESTIONS OF LAW IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

A. THE ISSUES RAISED INVOLVE IMPORTANT QUESTIONS OF LAW AFFECTING A LARGE MINORITY POPULATION GROUP SUGGESTING INHERENT UNFAIRNESS

1. The case law relied on by the Ninth Circuit either has no relevancy to the case at bench, or overlooked an important point of law

These matters were brought to the Ninth Circuit's attention in petitioner's petition for rehearing and request for rehearing en banc.

The memorandum below cited *Reno v. AADC, supra*. The court based its decision on the premise that "As a general matter —and assuredly in the context of claims such as those put forward in the present case— an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against deportation.[fn. omitted.]" 42 L.Ed. 2d, text at fn. 10. The case at bench involves a permanent lawfully admitted residence alien with identifiable constitutional rights as set forth hereinafter.

The memorandum below also relied on *Fiallo v. Bell*, 430 U.S. 787 (1977) that involved the disparate treatment in admissions of illegitimate children as being excluded from the definition of "child." Aside from the fact that the status of "illegitimate" is the result of private action, rather than INS action, and affects both those at home and those abroad, the court based its decision on "the serious problems of proof that usually lurk in paternity determinations." 430 U.S., text at fn. 8. This case is, (1) not an admissions case, Petitioner has been in this country since age 5, and (2) there is no paternity issue. Again, Petitioner's 1st and 5th Amendment rights are hinged on the rights defined by the U.S. Supreme Court as set forth supra, because he is a permanent legal resident alien.

Berroteran-Melendez v. INS, 955 F.2d 1251 (9th Cir. 1992) involved an OSC for deportation based on entry without inspection, i.e. illegal entry. Their defense was political asylum. 955 F2d, at 1251. Berroteran-Melendez falls squarely within the penumbra of *Reno, supra* in that an illegal alien acquires no rights. As previously stated, Petitioner is a permanent resident alien, and in view of the rights articulated by this Court, has acquired more than a unilateral expectation of due process prior to removal, including the right to show factors in mitigation.

The following case relied upon by the panel overlooks or ignores an important principal of constitutional law:

Briseno v. INS, 97-71182, is a recent Ninth Circuit decision, decided 10/13/99, and therefore still subject to a petition for writ of *certiorari*. While it appears to be factually and legally similar to Petitioner's, the nature and seriousness of the crimes are substantially different, and the age of entry is substantially different. The rationale of *Briseno* suffers for the same reason the decision in this case suffers: While Congress may have plenary power over immigration matters to the exclusion of the several States, it cannot act in excess of the limitations imposed by the Constitution at Art. I, § 9, and the Bill of Rights, as shown hereinafter..

2. While Congress has exclusive and plenary powers over immigration, it cannot act arbitrarily or contrary to Provisions of the Constitution.

Neither the 5th nor the 14th Amendment defines person. The 14th Amendment defines citizenship.[4] In other contexts, this Court

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[4] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, ..."

has held that aliens[5] are persons entitled to Constitutional protection.[6] In *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), the Court held that having invited aliens to this country, and given them green cards, the United States could not deny them employment based on alienage, declaring the ban on use of aliens unconstitutional. The fact of the matter is, treatment of even non resident aliens with courtesy and full protection of the internal laws of the state through which an alien passes has its historical precedent in the Magna Carta.[7] *Magna Carta*, Art. 41; McKechnie, Magna Carta; THE GREAT CHARTER OF KING JOHN. As McKechnie observed, the provision was designed to protect foreigners and promote trade. *Ibid.* Semble, *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (Businesses; municipal ordinance unconstitutional); *Traux v. Raich*, 239 U.S. 33, 39 (1915) (Employment; restriction unconstitutional); *Takahashi v. Fish & Game Commission*, 334 U.S. 419, 420 (1948) (Fishing rights).

Under our Constitution, the Federal Government is one of enumerated powers. *McCulloch* v. *Maryland*, 4 Wheat. 316, 405 (1819); see also The Federalist No. 45, p. 292 (C. Rossiter ed. 1961) (J. Madison). The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176

[5] *E.g., Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); U.S. Const., Art. VI, Treaty Clause; McKechnie, Magna Carta, Art. 41 (Aliens). There is no constitutional prohibition against confiscation of **enemy property**, but aliens not so denominated are entitled to the protection o f [the 5th Amendment.] C.f., *United States v. Chemical Foundation,*, 272 U.S. 1 (1926); *Stoehr v. Wallace*, 255 U.S. 239 (1921), *with Sailesian-American Corp. v. Clark*, 332 U.S. 469 (1947), *Russian Fleet v. United States*, 282 U.S. 4891 (1931), *and Guessefeldt v. McGrath*, 342 U.S. 308 (1952).

[6] *E.g., Land v. Dollar*, 330 U.S. 731 (1947) (*Replevin*; Stock taken under color of federal law).

[7] Although the issue of an illegal alien is not directly at issue here, as a matter of equal protection implicit in the 5th Amendment (*Bolling v. Sharpe*, 347 U.S. 497 (1954)) they have derivative protection based on the needs of other family members. *E.g., Procunier v. Martinez*, 416 U.S. 396 (1978) [1st Amendment; Communications; Family Rights]

(1803);). *Generally., Boerne v. P.F. Flores*, 521 U.S. 511, 515 (1997).[8]

Whether the Congress relied on its powers under the "necessary and proper" clause or on the 14th Amendment in passing IIRAIRA is not all clear. Article I, § 8, cl. 18 provides,[9] in relevant part:

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

On the other hand, Article I, § 9, provides, in relevant part:

> "[Cl. 1] The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

And the 8th Amendment, provides, in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law

---

[8] The scope of protection afforded by the Bill of Rights is the same, whether asserted against state officials or federal officials.

[9] While the 14th Amendment appears to be directed at the several states, it does not negate the right of Congress to enforce the Bill of Rights as against the federal government. *E.g, Bivens v. Six Unknown Agents of the FBN*, 403 U.S. 388 (1971); *Butz v. Economou*, , 438 U.S. 478 (1975) (Abolishing distinctions in liability for federal government employees acting under color of law and state employees acting under color of law); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (Recognizing an "equal protection" element to the "due process" clause of the 5th Amendment)

support drawing the distinction, one apparent from the text of the Amendment. E.g., *Boerne v. P.F. Flores*, 521 U.S. 511, 519-20 (1997), and *Wayman v. Southhard*, 23 U.S. (10 Wheat.) 1 (1825).

It would be arbitrary and capricious, and violative of the spirit of the 5th Amendment (*Bolling v. Sharpe*, 347 U.S. 497 (1954) (Equal protection implicit in due process clause.).) if we deported aliens merely because they committed an offense in this country for reasons which arose here, when others, by luck of birth, would not similarly be deportable. Factors taken into consideration for deportation, therefore, must take into consideration the context of how many years the alien has been in the country, age at time of arrival, the effect on the rest of the family, especially children, if any, and the impact such a deportation may have in the international community, i.e. is it the right and fair thing to do.

It does not appear that the wholesale detention and deportation of aliens cannot be sustained against the foregoing Constitutional framework.

3. This Court has held that Resident Legal Aliens are entitled to due process of law.

This court has time and again had to set aside congressional legislation that struck at the rights of resident legal aliens.

Aliens are a prime example of a 'discrete and insular' minority for whom heightened judicial solicitude is appropriate. *Graham v. Richardson*, 403 U.S. 365 (1971) (Social security; state statute unconstitutional); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (Businesses; municipal ordinance unconstitutional); *Traux v. Raich*, 239 U.S. 33, 39 (1915) (Employment; restriction unconstitutional); *Takahashi v. Fish & Game Commission*, 334 U.S. 419, 420 (1948) (Fishing rights). International relations is protected by Art. VI, cl 2 (treaty clause), such that disparate treatment of aliens lawfully within the country ought not be tolerated unless clearly warranted and tied to a clearly defined and legitimate governmental interest.

Successful procedural and substantive due process challenges were brought to a former provision of the Immigration Act of 1988, which required the mandatory detention of all aggravated felons. *E.g., Leader v. Blackman*, 744 F.Supp. 500 (S.D.N.Y. 1990) (pre-

sumption of deportability based on an aggravated felony does not eliminate need for bail hearing); *Kellman v. INS*, 750 F.Supp. 625 (S.D.N.Y. 1990); *Paxton v. INS*, 745 F. Supp. 1261 (E.D. Mich 1990) dismissed as moot, 925 F.2d 1465 (6th Cir. 1992); *Probart v. INS*, 750 F.Supp. 1007 (E.D. Mich. 1990), aff'd other gnds, 954F.2d 1253 (6th Cir. 1992); *Agunobi v. Thornburgh*, 745 F. Supp. 533 (N.D. Ill. 1990). More recently, successful procedural and substantive due process challenges were brought against a statute that requires the mandatory detention of lawful permanent residents in exclusion proceedings. E.g., *St. John v. McElory*, 917 F. Supp. 243 (S.D.N.Y. 1996); *Ekeklior v. Aijeus*, 979 F.Supp. 540 (N.D. Ill. 1997) (Appeal pending); *Cabaljero v. Caplinger*, 914 F. Supp. 1374 (E.D. La. 1996). *Cabaljero* specifically held as unconstitutional the mandatory detention of a nonlawfully admitted alien with an aggravated felony conviction.

In light of *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) and *Matthews v. Diaz*, 426 U.S. 67, 77 (1976), among others, *Reno v. American-Arab Anti-Discrimination committee*, 42 L.Ed.2d 929 (1999) is distinguishable in that the latter case, dealt with illegal aliens and in this case Petitioner, as a legal resident alien had, under the former cases, minimum constitutional guarantees of due process such that it appears that IIRIRA is unconstitutional as applied to legal resident aliens. However, it requires this court's review to determine that issue and the court ought to do so for the public good in view of the numbers of legal resident aliens potentially affected.

B. THE HANDLING OF THE STAY IN THIS CASE IS A MAJOR DEPARTURE FROM THIS COURT'S PRECEDENCE FAVORING BAIL FOR LEGAL RESIDENT ALIENS.

The IIRIRA appears unconstitutional, on its face, or as applied to legal resident aliens in the manner in which bail, detention and the respect for this court's orders regarding stays are concerned in light of the 8th Amendment, as construed by this Court making the provision on prohibition against excessive bail applicable to legal resident aliens in *Stack v. Boyle*, 342 U.S. 1, 4 (1951); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950).

The Ninth Circuit apparently thought it could stay deportation, and stayed deportation. Yet when the INS defaulted Petitioner for

failure to report for deportation, it refused to enforce its order allowing a substantial default.

The scope of bail, and the power of the courts to order bail, or stays, with respect thereto need to be resolved by this court where it impacts on legal resident aliens.

C. THE DENIAL OF JUDICIAL REVIEW AND HABEAS CORPUS RELIEF REPRESENTS A MAJOR AND PROPOUND DEPARTURE FROM THIS COURT'S PRECEDENCE FAVORING AT LEAST DUE PROCESS FOR RESIDENT LEGAL ALIENS, AND APPEARS TO BE BEYOND CONGRESSONAL POWER IN VIEW OF U.S. CONST. ART. I, § 9.

The IIRIRA appears to be unconstitutional, on its face, or as applied, in denying appeal, judicial review or a challenge to the law in view of *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (Businesses; municipal ordinance unconstitutional); *Traux v. Raich*, 239 U.S. 33, 39 (1915) (Employment; restriction unconstitutional); *Takahashi v. Fish & Game Commission*, 334 U.S. 419, 420 (1948) (Fishing rights); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (Federal employment for legal resident aliens); *Mothers & Children's Rights Organization v. Sterrett*, 467 F.2d 797 (7th Cir., 1972); *Yee-Litt v. Richardson*, 353 F.Supp. 996 (1973) [Rejecting the fact-policy distinction; pre-termination argument required prior to termination of benefits], judgment *affirmed* 412 U.S. 924.

The District Court found it had no say in the matter. The Ninth Circuit found that Petitioner had no rights. That finding alone flies in the face of precedent from this court that as a legal resident gains ties with the community, there is a correlative expectation of due process. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) and *Matthews v. Diaz*, 426 U.S. 67, 77 (1976), among others.

Reno v. American-Arab Anti-Discrimination committee, 42 L.Ed.2d 929 (1999) is distinguishable in that the latter case, dealt with illegal aliens and in this case Petitioner, as a legal resident alien had, under the former cases, minimum constitutional guarantees of due process such that it appears that IIRIRA is unconstitutional as applied to legal resident aliens. However, it requires this court's review to determine that issue and the court ought to do so

for the public good in view of the numbers of legal resident aliens potentially affected.

Because there appears to be a substantial departure from the precedent of this court, affecting a large population comprised of a discrete and insular minority group, this court should grant review as to the powers of congress with respect to legal resident aliens.

D. MANDATORY DEPORTATION UPON THE FINDING OF BEING AN "AGGRAVATED FELON" APPEARS TO BE A MAJOR DEPARTURE FROM PRECEDENT OF THIS COURT REQUIRING A CASE BY CASE DETERMINATION AS TOTHE APPROPRIATENESS OF A PARTICULAR REMEDY

The IIRIRA appears to be unconstitutional, on its face, or as applied, in mandating the deportation of resident legal aliens on the mere finding of being an "aggravated felon." At a minimum, the 1st and 5th Amendments, as protected by procedural due process under the 5th Amendment, appears to require affording a resident legal alien an opportunity to show factors in mitigation, or other good cause in defense of deportation. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) and *Matthews v. Diaz*, 426 U.S. 67, 77 (1976); *Procunier v. Martinez*, 416 U.S. 396 (1978) (1st Amendment; Communications; Family Rights).

In analogous situations, this court had held that it is unconstitutional to mandate the death penalty on a finding of guilt. The court has reasoned that the death penalty is such a unique penalty, that it requires the exercise of guided discretion. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana* (1976) 428 U.S. 325, 333-334; *Baldwin v. Alabama*, 472 U.S. 372 (1985) (Statute saved because after jury imposition of death penalty, judge weighed aggravating and mitigating circumstances to determine whether or not penalty would in fact be imposed); *Sumner v. Shuman*, 483 U.S. 66 (1987) (Applies to Prisoners who, serving life for murder, are convicted of killing a fellow inmate; deterrence value rejected; narrow class of cases rejected); *Solem v. Helm*, 463 U.S. 277 (1983)(Will not foreclose the possibility for rehabilitation). Moreover, banishment has been held to be a form of punishment, and as such unconstitutional. 24B C.J.S., Criminal Law § 1974, at

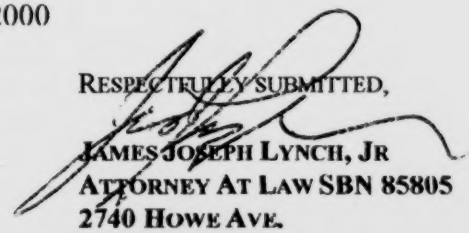
n. 5.5 (Banishment is punishment); 3 Rotunda, Treatise On Constitutional Law § 22.5 (Involuntary Expatriation Impermissible.).

Granted, deportation is not punishment. But is a form of banishment from this Country, as applied to these cases, and as such amounts to constructive banishment. Of urgent concern is that deprivation of quasi-citizenship is second only in impact to the death penalty. In this case, a young man in this country since age 5 will be, without intervention of this court, irretrievably separated for the rest of his life from his family and the only home and life that he knows. And this is a chronic problem that not many in the position of petitioner can afford to fight. Because of the Constitutional issues involved, and the significant impact these laws have on a minority group, it is submitted that the issues are of significant magnitude and importance to warrant the utilization of this court's scant time and resources to resolve the issues raised herein.

CONCLUSION

WHEREFORE, Petitioner prays, for all, or any one of, the foregoing reasons, this court grant the writ of *certiorari* to the Ninth circuit, and summarily reverse and remand, or set the matter for briefing and argument.

Dated: January 23, 2000



RESPECTFULLY SUBMITTED,

JAMES JOSEPH LYNCH, JR
ATTORNEY AT LAW SBN 85805
2740 HOWE AVE.
P. O. BOX 336
SACRAMENTO, CA 95812-0336
OFFICE: (916) 448-7871
FAX: (916) 448-0549

ATTORNEY FOR PETITIONER

APPENDIX

FILED
NOV 15, 1999
CATHY CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTURO ARIZAGA RAMOS, JR., Plaintiff/Appellant, vs. District Director, Executive Office for Immigration Review, Office of Immigration Judge, Defendant/Appellee	9th Cir. # 99-16047 [DC No.: 99-1906 SBA] MEMORANDUM[1]

Appeal from the United States District Court
For the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Argued and Submitted November 1, 1999
San Francisco, California

Before: CANBY, THOMPSON, and GRABER, Circuit Judges.

Plaintiff Arturo Arizaga Ramos, Jr., filed this action, which he labeled a complaint for habeas corpus relief, challenging an order of removal issued against him by the Immigration and Naturalization Service (INS).

Plaintiff contends that habeas relief remains available for constitutional

1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

claims, notwithstanding 8 U.S.C., § 1252(b)(9) and (g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). The Supreme Court has left his question open. See Reno v. American-Arab Anti-Discrimination Comm., 119 S.Ct. 936, 942 n. 7 (1999).

The district court viewed the mater as a request for an injunction. The court denied that request on two alternative grounds; first, that it lacked jurisdiction under the foregoing provisions of IIRIRA; and, second, that Plaintiff raised no serious question regarding the merits (even if the statute as written violates the suspension clause).

The government advances a third view of the procedural posture of the case. It contends that this court can review constitutional claims on direct review of a removal order and that we should treat the filing of the habeas action as a timely request for such review, filed in the wrong court, and transfer it to ourselves for consideration. See 28 U.S.C., § 1631.

We need not resolve the questions of statutory interpretation and procedure that these three alternatives present because, however Plaintiff might bring his substantive constitutional clams to our attention, none of them has even colorable merit. *See Briseno v. INS*, No. 97-71182, 1999 WL 812942, at *2 (9th Cir. Oct. 13, 1999)(refusing to address whether this court retains jurisdiction over

"colorable constitutional claims" arising under IIRIRA, because plaintiff did not present any such claims).

Plaintiff first argues that Congress violated the Equal Protection Clause and due process by distinguishing between aliens in expedited removal proceedings and other aliens in 8 U.S.C., § 240 removal proceedings. In deference to Congress' plenary power over immigration, *see Fiallo v. Bell*, 430 U.S. 787, 792 (1972), courts evaluate classifications among aliens under the rational-basis test, *see Berroteran-Melendez v. INS*, 955 F.2d 1251, 1258 (9th Cir. 1992). In view of the greater procedural protections afforded in full removal proceedings and the circumstances in which expedited proceedings occur, the distinction is rationally related to legitimate governmental interests.

Plaintiff next argues that he has been denied due process, because he may be deported, a "cruel and unusual punishment," without having had an opportunity to present mitigating evidence. Removal is not, however, punishment. *See Briseno*, 1999 WL 812942, at *2. We already have noted that Congress has plenary power over immigration; that power encompasses the power to enact a statute declaring removable any alien who has committed certain crimes. On Appeal Plaintiff concedes hat he has in fact committed a listed crime.

Plaintiff's other major argument is that "[t]he linchpin of this case is

whether the statute, as applied to [him], is punitive and thereby subject to the [E]x [P]ost [F]acto and [D]ouble [J]eopardy [C]lauses of the United States Constitution." It is, however, well established that neither principle applies here. "While the consequences of deportation may assuredly be grave, they are not imposed as punishment." *Reno*, 119 S.Ct. 947; see also *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("[W]hatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation.")

In summary, none of Plaintiff's constitutional claims has even colorable merit. Even if habeas remains available as to colorable constitutional claims, see Webster v. Doe, 486 U.S. 592, 603 (1988), Plaintiff brings no such claim. If instead such claims must be presented to this court in the first instance, we decline to exercise our discretion to transfer the petition here, for the same reason.

AFFIRMED.

FILED

JAN 12, 2000

CATHY CATTERSON, CLERK

U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTURO ARIZAGA RAMOS, JR., Plaintiff/Appellant, vs. District Director, Executive Office for Immigration Review, Office of Immigration Judge, Defendant/Appellee	9th Cir. # 99-16047 [DC No.: 99-1906 SBA] ORDER

Before: CANBY, THOMPSON, and GRABER, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Graber has voted to deny the petition for rehearing en banc, and Judges Canby and Thompson have so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing *en banc* are DENIED.

FILED

MAY 27, 1999

CATHY CATTERSON, CLERK

U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTURO ARIZAGA RAMOS, JR., Plaintiff/Appellant, vs. District Director, Executive Office for Immigration Review, Office of Immigration Judge, Defendant/Appellee	9th Cir. # 99-16047 [DC No.: 99-1906 SBA] ORDER

Before: W. FLETCHER, Circuit Judge.

This court has received appellant's motion for stay of deportation.

Appellant's deportation is stayed temporarily until the court rules on appellant's motion for stay. *See De Leon v. INS,* 115 F.3d 643 (9th Cir. 1997).

The court *sua sponte* grants appellees an extension of time to file an opposition, or notice of non-opposition, to the motion for stay. The response is due June 17, 1999.

The motion for stay of deportation will be presented to the next available motions panel after receipt of appellees' opposition or notice of non-opposition. In

the event appellees' opposition contains a motion to dismiss the appeal, both motions will be presented to the next available motions panel. *See id.*

The appeal filed May 26, 1999 is a preliminary injunction appeal. Accordingly, Ninth Circuit Rule 3-3 shall apply.

Within 7 days of filing the notice of appeal, the parties shall make arrangement to obtain from the court reporter an official transcript of proceedings in the district court which will be included in the record on appeal. *See* 9th Cir. R. 3-3(b).

The briefing schedule is set as fo9llows: the opening brief is due June 23, 1999; the answering brief is due July 21, 1999; and the optional reply brief is due within 14 days of service of the answering brief. *See* 9th Cir. R. 30-3(b).

The appeal and any motions pending at the time briefing is completed shall be referred to the next available motions panel for disposition. *See* 9th Cir. R. 3-3(d).

FILED

OCT 28, 1999

CATHY CATTERSON, CLERK

U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTURO ARIZAGA RAMOS, JR., Plaintiff/Appellant, vs. District Director, Executive Office for Immigration Review, Office of Immigration Judge, Defendant/Appellee	9th Cir. # 99-16047 [DC No.: 99-1906 SBA] ORDER

Petitioner's motion to stay deportation is GRANTED until the mandate in this case issues.

FOR THE COURT

CATHY A. CATTERSON
CLERK OF COURT

By Give Bae
[illegible handwriting]
Deputy Clerk.

FILED

DEC 6, 1999

CATHY CATTERSON, CLERK

U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTURO ARIZAGA RAMOS, JR., Plaintiff/Appellant, vs. District Director, Executive Office for Immigration Review, Office of Immigration Judge, Defendant/Appellee	9th Cir. # 99-16047 [DC No.: 99-1906 SBA] ORDER

Before: CANBY, THOMPSON, and GRABER, Circuit Judges.

Appellant's Emergency motion Under Circuit Rule 27-3 for Sanctions for Violation of Stay Order is DENIED.

[REPRINT FROM THE INTERNET]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MERCEDES DE LEON,	)	9th Cir. # 97-70127
	)	
Petitioner	)	[DC No.: 99-1906 SBA]
	)	
v.	)	
	)	
IMMIGRATION AND NATURALIZATION SERVICE	)	ORDER
	)	
Defendant/Appellee	)	
	)	

Petition for Review of a Decision of the Board of Immigration Appeals
Submitted to the Motions Panel May 20, 1997

Filed: May 22, 1997

Before: FLETCHER, REINHARDT and FERNANDEZ, Circuit Judges.

COUNSEL

Enrique Arevalo, South Pasadena, California, for the petitioner.

Allen W. Hausman, Office of Immigration Litigation, Department of Justice, Washington, D.C., for the respondent.

ORDER

Petitioner Mercedes De Leon moves for a stay of deportation pending disposition of her petition for review of the Board of Immigration Appeals' order affirming the denial of her applications for asylum and withholding of deportation under sections 208(a) and 243(h) of the Immigration and Nationality Act ("INA"), 8 U.S.C.

1158(a) & 1253(h), and suspension of deportation under section 244(a) of the INA, 8 U.S.C. 1254(a).

Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), in most cases the filing of a petition for review automatically stayed the petitioner's deportation pending review. See 8 U.S.C. 1105a(a)(3), repealed by IIRIRA 306(b). IIRIRA eliminated the automatic stay. See IIRIRA 309(c)(4)(F). Now, "service of the petition for review shall not stay the deportation of an alien pending the court's decision on the petition, unless the court orders otherwise." Id. The court has been inundated with motions for stay of deportation since the enactment of IIRIRA. To enable this court to process the large number of stay requests, and to eliminate the risk that petitioners will be deported before their stay requests are decided, we adopt the following procedures which shall apply unless and until the court adopts different rules or procedures:

> 1. The filing of a motion for stay or a request for a stay contained in a petition for review will stay a petitioner's deportation temporarily until the court rules on the stay motion;
>
> 2. Respondent's opposition, or notice of non-opposition, to the motion for stay must be filed within seven days after service of the motion on the agency, pursuant to Fed. R. App. P. 27(a); see also Fed. R. App. P. 26(c) (providing three-day extension for filing after service by mail); and,
>
> 3. The motion for a stay of deportation will be presented to the next available motions panel after receipt of respondent's opposition or notice of non-opposition. In the event respondent's opposition contains a motion to dismiss the petition, both motions will be presented to the next available motions panel.
>
> Accordingly, Petitioner De Leon's deportation is temporarily stayed pending this court's decision on the merits of her motion for a stay of deportation.

IMMIGRATION COURT
550 KEARNY ST., SUITE 800
SAN FRANCISCO, CA 94108

In the matter of	)	No. A35-581-469
	)	
ARIZAGA-RAMOS, ARTURO	)	IN REMOVAL PROCEEDINGS
	)	
Respondemt	)	
	)	
	)	
	)	
	)	
	)	
	)	

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered n Nov. 18, 1998. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or re-opened, the oral decision will become the official opinion of the case.

[X] The respondent was ordered removed from the United States to MEXICO ort in the alternative to

[ ]

[X] Respondent's application for cancellation of removal under section 240A(a) was () granted ( ) denied (X) ~~withdrawn~~ *pretermitted*

[ ]

[X] Other:

Dated: Nov. 18, 1998 Appeal Due By: 12/18/98

Bette Kane Stockton
BETTE KANE STOCKTON
Immigration Judge

[NOTE: Only the parts of preprinted form X'd by judge are reproduced here, and all X'd parts do appear here.]

EXCERPTS, U.S. CONSTITUTION

ART. I, SECTION. 9.

"[Cl. 1] *****

"[Cl. 2] The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

"[Cl. 3] No Bill of Attainder or ex post facto Law shall be passed."

ART. III, SECTION. 2.

[Cl. 1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

ARTICLE 6.

[Cl. 2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; **and all Treaties made or which shall be made**, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

1ST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

5TH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

6TH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

14TH AMENDMENT

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

McKechnie, MAGNA CARTA; THE GREAT CHARTER OF KING JOHN

Magna Carta 1215

Art. 36

[Writ of Habeas Corpus]

Nothing shall be given or taken in future for the writ of inquisition of life or limbs: instead it shall be granted free of charge and not refused.

Art. 41

[Foreign Merchants]

All merchants shall be able to go out of and come into England safely and securely and stay and travel throughout England, as well by land as by water, for buying and selling by the ancient and right customs free from all evil tolls, except in time of war and if they are of the land that is at war with us. And if such are found in our land at the beginning of a war, they shall be attached, without injury to their persons or goods, until we, or our chief justiciar, know how merchants of our land are treated who were found in the land at war with us when war broke out, and if ours are safe there, the others shall be safe in our land.

Art. 61

[Security Clauses]

Since, moreover, for God and the betterment of our kingdom and for the better allaying of the discord that has arisen between us and our barons we have granted all these things aforesaid, wishing them to enjoy the use of them unimpaired and unshaken for ever, we give and grant them the under-written security, namely, that the barons shall choose any twenty-five barons of the kingdom they wish, who must with all their might observe, hold and cause to be observed, the peace and liberties which we have granted and confirmed to them by this present charter of ours, so that if we, or our justiciar, or our bailiffs or any one of our servants offend in any way against anyone or transgress any of the articles of the peace or the security and the offence be notified to four of the aforesaid twenty-five barons, those four barons shall come to us, or to our justiciar if we are out of the kingdom, and, laying the transgression before us, **shall petition us to have that transgression corrected** without delay. And if we do not correct the transgression, or if we are out of the kingdom, if our justiciar does not correct it, within forty days, reckoning from the time it was brought to our notice or to that of our justiciar if we were out of the kingdom, the aforesaid four barons shall refer that case to the rest of the twenty-five barons and those twenty-five barons together with the community of the whole land shall distrain and distress us in every way they can,

namely, by seizing castles, lands, possessions, and in such other ways as they can, saving our person and the persons of our queen and our children, until, in their opinion, amends have been made; and when amends have been made, they shall obey us as they did before. And let anyone in the land who wishes take an oath to obey the orders of the said twenty-five barons for the execution of all the aforesaid matters, and with them to distress us as much as he can, and we publicly and freely give anyone leave to take the oath who wishes to take it and we will never prohibit anyone from taking it. Indeed, all those in the land who are unwilling of themselves and of their own accord to take an oath to the twenty-five barons to help them to distrain and distress us, we will make them take the oath as aforesaid at our command. And if any of the twenty-five barons dies or leaves the country or is in any other way prevented from carrying out the things aforesaid, the rest of the aforesaid twenty-five barons shall choose as they think fit another one in his place, and he shall take the oath like the rest. In all matters the execution of which is committed to these twenty-five barons, if it should happen that these twenty-five are present yet disagree among themselves about anything, or if some of those summoned will not or cannot be present, that shall be held as fixed and established which the majority of those present ordained or commanded, exactly as if all the twenty-five had consented to it; and the said twenty-five shall swear that they will faithfully observe all the things aforesaid and will do all they can to get them observed. And we will procure nothing from anyone, either personally or through anyone else, whereby any of these concessions and liberties might be revoked or diminished; and if any such thing is procured, let it be void and null, and we will never use it either personally or through another. [Emphasis added.]

Supreme Court, U.S.
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(2)

No. 99-1259

In the Supreme Court of the United States

ARTURO ARIZAGA RAMOS, PETITIONER

v.

DISTRICT DIRECTOR, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF IMMIGRATION JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
ERNESTO H. MOLINA, JR.
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court had jurisdiction under 28 U.S.C. 2241 to review petitioner's contention that the Constitution does not permit Congress to make an alien convicted of an aggravated felony subject to removal from the United States without the opportunity for discretionary relief from removal.

2. Whether the Constitution permits Congress to provide that an alien convicted of an aggravated felony is subject to removal without the opportunity for discretionary relief.

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In the Supreme Court of the United States

No. 99-1259

ARTURO ARIZAGA RAMOS, PETITIONER

v.

DISTRICT DIRECTOR, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF IMMIGRATION JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A3) is unpublished, but the decision is noted at 202 F.3d 279 (Table). The order of the district court (App., *infra*, 1a-19a) is unreported. The orders of the Board of Immigration Appeals (App., *infra*, 20a-21a) and the immigration judge (Pet. App. A11) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1999. A petition for rehearing was denied on January 12, 2000. Pet. App. A4. The petition

for a writ of certiorari was filed on February 4, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a challenge to the application and constitutionality of new provisions of the immigration laws concerning the treatment given to lawful permanent resident aliens who are found to be removable from the United States, and who are ineligible for discretionary relief from removal because of their convictions for certain serious crimes.

In 1996, the Immigration and Nationality Act (INA) was comprehensively revised by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. I, 110 Stat. 3009-546 *et seq.* IIRIRA eliminated the provisions under prior law for "deportation" and "exclusion" proceedings and instead created one new form of proceeding, known as "removal." See 8 U.S.C. 1229a (Supp. IV 1998).[1] Some aliens who are found to be removable may apply to the Attorney General for discretionary relief from removal (known as "cancellation of removal" under the new terminology of IIRIRA). See 8 U.S.C. 1229b(a) (Supp. IV 1998). An

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[1] IIRIRA did retain some distinctions in removal proceedings, based on whether the alien had been lawfully admitted into the United States. Aliens who have already been lawfully admitted into the United States may be removed from the United States if they are found to be "deportable" on one or more grounds. See 8 U.S.C. 1227(a) and 1229a(a)(1) (1994 & Supp. IV 1998). Aliens seeking admission into the United States may be denied admission and removed if they are found to be "inadmissible" on one or more grounds. See 8 U.S.C. 1182(a) and 1229a(a)(1) (1994 & Supp. IV 1998).

alien who is removable based on a conviction for an "aggravated felony," however, is ineligible for cancellation of removal. 8 U.S.C. 1229b(a)(3) (Supp. IV 1998). The INA defines "aggravated felony" to include illicit trafficking in a controlled substance, a crime for which petitioner was convicted. 8 U.S.C. 1101(a)(43)(B).[2]

IIRIRA also established significant changes to the provisions governing judicial review of final orders of removal. Section 306(b) of IIRIRA repealed former 8 U.S.C. 1105a (1994), which had governed judicial review of final orders of deportation. See 110 Stat. 3009-612. In its stead, Congress enacted a new 8 U.S.C. 1252 (Supp. IV 1998). See IIRIRA § 306(a)(2), 110 Stat. 3009-607. Section 1252(a)(1), as added by IIRIRA, provides that "[j]udicial review of a final order of removal (other than an order of removal without a hearing pursuant to [8 U.S.C. 1225(b)(1)]) * * * is governed only by" the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998), which requires that a petition for review be filed in the

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[2] Before the immigration laws were comprehensively revised in 1996, some aliens who were convicted of aggravated felonies and were deportable on that basis were nonetheless eligible to receive discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). Only aliens who had been convicted of an aggravated felony and had served a term of imprisonment of at least five years for that offense were categorically ineligible for relief. *Ibid.* In 1996, however, Congress twice made all aliens convicted of aggravated felony offenses ineligible for discretionary relief from deportation, without regard to the sentence imposed or served—first, in Section 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, which amended 8 U.S.C. 1182(c), and then again in 8 U.S.C. 1229b (Supp. IV 1998), added to the INA by Section 304(a)(3) of IIRIRA, 110 Stat. 3009-594.

appropriate regional court of appeals, rather than the district court.[3] In addition, Section 1252(b)(9) provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

8 U.S.C. 1252(b)(9) (Supp. IV 1998).

2. Petitioner is a native and citizen of Mexico who entered the United States in 1977. In 1993, petitioner was convicted of receiving stolen goods, for which he was sentenced to probation. In 1995, he was convicted in state court of possession of a controlled substance (methamphetamine) for sale, for which he was sentenced to serve two years in prison. Pet. 4; App, *infra*, 2a.

In 1997, the Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner, charging him with being removable based on his conviction for possession of methamphetamine for sale, which is an aggravated felony under the INA. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998). On November 18, 1998, an immigration judge (IJ) found petitioner

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[3] Section 1225(b) provides a procedure for inspection and removal of aliens seeking admission into the United States. In that situation, if the immigration officer determines that the alien is inadmissible, the officer shall order the alien removed without further hearing, unless the alien indicates an intention to apply for asylum or a fear of persecution. 8 U.S.C. 1225(b)(1)(A)(i) (1994 & Supp. IV 1998). Congress has expressly provided, in 8 U.S.C. 1252(e)(2) (Supp. IV 1998), for limited review of such orders by habeas corpus.

removable as charged. Pet. App. A11. On December 14, 1998, petitioner's counsel mailed a notice of appeal to the Board of Immigration Appeals (BIA). That notice, however, was not received by the BIA until December 21, 1998, and was therefore out of time. App., *infra*, 20a; 8 C.F.R. 240.15 (requiring filing of any appeal to the BIA within 30 calendar days of mailing of written decision by IJ, and defining filing date as receipt of notice of appeal by BIA). On March 12, 1999, the BIA dismissed the appeal as untimely. App., *infra*, 20a-21a.

3. On April 16, 1999, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. Petitioner contended, among other things, that he was denied effective assistance of counsel in his immigration proceedings because his counsel failed to file a timely appeal to the BIA, and that principles of due process and equal protection prohibit Congress from rendering a lawful permanent alien removable based on a criminal offense without regard to the alien's individual circumstances.

4. The district court denied petitioner's request for a preliminary injunction and dismissed the habeas corpus petition. App., *infra*, 1a-19a. The district court concluded that it was without jurisdiction to entertain the habeas corpus petition. In particular, the court determined that judicial review of petitioner's final order of removal was governed by Section 1252, including Section 1252(b)(9), which dictates that "the only avenue of judicial review * * * that might pertain to [petitioner's] case is a petition to the Court of Appeals for direct review of the removal order issued against him." *Id.* at 8a. The district court also relied (*ibid.*) on this Court's decision in *Reno* v. *American-Arab Anti-*

Discrimination Committee, 525 U.S. 471, 483 (1999) (*AADC*), where the Court referred to Section 1252(b) (9) as an "unmistakable 'zipper' clause" channeling cases into the courts of appeals rather than the district courts.

The district court also concluded that petitioner's claims were without merit. App., *infra*, 10a-19a. First, noting that petitioner "appears to be complaining about Congress's decision that a single aggravated felony is sufficient to require the removal of an alien who is otherwise lawfully present in the United States," the court concluded that Congress's "plenary authority over immigration matters" is sufficient to overcome any constitutional objections to that decision. *Id.* at 12a. The court also rejected petitioner's argument that the removal of an alien based on an aggravated felony conviction, without the opportunity for discretionary relief, violates equal protection because a United States citizen convicted of the same crime would face no such result. The court emphasized that removal "is not a remedy available against citizens but rather is an implementation of Congress' power to exclude" aliens from the United States. *Ibid.*

The court further ruled that petitioner had not been deprived of an opportunity to present his arguments during his immigration proceedings, since he appeared before an IJ and had the opportunity to appeal to the BIA, although he failed to do so in a timely manner. App., *infra*, 13a-14a. And it held that, insofar as IIRIRA made petitioner categorically ineligible for discretionary cancellation of removal based on his aggravated felony offense, that change in the law did not

contravene the presumption against retroactive application of federal civil statutes. *Id.* at 14a-16a.[4]

5. After granting a stay of deportation pending its decision in the case, Pet. App. A7, the court of appeals affirmed, *id.* at A1-A3.[5] Without definitively resolving the issue whether the district court would have had jurisdiction under 28 U.S.C. 2241 over a colorable constitutional challenge to petitioner's final order of removal, the court of appeals concluded that no such colorable constitutional challenge was presented in this case. *Id.* at A2. It rejected petitioner's contention that the Constitution prevented his removal "without having had an opportunity to present mitigating evidence," since "Congress has plenary power over immigration; that power encompasses the power to enact a statute

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[4] The district court stated that petitioner "does not show when Congress made his prior conviction an 'aggravated felony' for purposes of the immigration laws." App., *infra*, 15a n.11. In fact, petitioner's drug trafficking offense was classified as an "aggravated felony" even in 1995, when petitioner committed the offense and before IIRIRA was enacted. See 8 U.S.C. 1101(a)(43)(B) (1994). The change in the law introduced in 1996, by AEDPA and IIRIRA, was that all aliens convicted of aggravated felonies are ineligible for discretionary relief from deportation, without regard to the length of the sentence imposed or served. See p. 3 n.2, *supra*.

[5] On June 20, 1997, while petitioner's administrative removal proceedings were in progress, Larry Shanahan posted bond on behalf of petitioner. App., *infra*, 25a. On May 6, 1999, the INS sent Shanahan a Notice to Deliver, directing him to present petitioner to the INS office on June 1, 1999, in San Francisco. *Ibid.* Shanahan did not present petitioner to the INS on that date. On June 16, 1999, the INS District Director found that the delivery bond had been breached. *Ibid.* Shanahan appealed that decision to the INS Administrative Appeals Office, which affirmed the District Director's finding of a breach of bond. *Id.* at 25a-28a.

declaring removable any alien who has committed certain crimes." *Id.* at A3. The court also found no colorable issue presented under either the Ex Post Facto or Double Jeopardy Clause by the application to petitioner of IIRIRA's categorical exclusion of aliens convicted of aggravated felonies from discretionary cancellation of removal, noting that "[w]hile the consequences of deportation may assuredly be grave, they are not imposed as [a] punishment." *Ibid.* (quoting *AADC*, 525 U.S. at 491).

ARGUMENT

The court of appeals correctly held that petitioner's challenges to his removal order are without substance. The court of appeals' unpublished decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.[6]

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[6] There is a threshold issue whether the court of appeals erred in concluding that petitioner had not presented colorable claims on the merits, without first deciding whether federal courts actually had jurisdiction to decide those claims. This Court has disapproved the practice of "hypothetical jurisdiction" under which a federal court assumes, without deciding, that it has subject matter jurisdiction over the case but then rules on the merits against the plaintiff or complainant that invokes federal jurisdiction. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998). It does not appear, however, that the court of appeals contravened the *Steel Co.* rule against hypothetical jurisdiction in this case. The court of appeals concluded in this case that petitioner had not even presented a *colorable* challenge based in federal law to his removal order. It therefore did not reach the question whether the district court would have had habeas corpus jurisdiction if petitioner had presented a colorable constitutional claim. See Pet. App. A3 (citing *Webster* v. *Doe*, 486 U.S. 592, 603 (1988), in which the Court declined to read a statutory preclusion of judicial review to bar review of colorable constitutional claims). The court of

1. Petitioner appears to raise two constitutional challenges to his removal order. First, he contends (Pet. 12) that, because Congress has provided that only aliens, and not citizens, are to be removed from the United States based on the commission of an aggravated felony without the opportunity to present mitigating evidence, Congress has denied aliens equal protection. Second, he argues (Pet. 15-16) that principles of due process require that aliens be permitted an opportunity to show why, as a matter of discretion, they should not be removed. Both arguments are wholly without substance.

a. There is plainly no basis for petitioner's argument that Congress may not treat aliens and citizens differently merely because of the accident of the location of their birth (see Pet. 12). Citizens of the United States have a right inherent in the Constitution to reside in this country. See *United States* v. *Wong Kim Ark*, 169 U.S. 649, 694-704 (1898). Congress's power to exclude and expel aliens, by contrast, is a power inherent in the Nation's sovereignty. See *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711 (1893); see also *Reno* v. *Flores*, 507 U.S. 292, 305-306 (1993); *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982); *Carlson* v. *Landon*, 342 U.S. 524, 534 (1952); *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924). The Court has consistently emphasized the breadth of the congressional prerogative to admit, exclude, or expel aliens:

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appeals' conclusion amounts, in effect, to a determination that the federal courts do not have jurisdiction over petitioner's claims. We do not read the *Steel Co.* decision as precluding federal courts from determining that the alleged federal claims before them are not even colorable and dismissing the claims on that basis, without first examining whether there would be a statutory basis for entertaining the claims if they were colorable.

> The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.

Fiallo v. *Bell*, 430 U.S. 787, 796 (1977).

Petitioner therefore errs in arguing (Pet. 11) that, in exercising its plenary authority over immigration, Congress is subject to a "proportionality" test similar to that governing Congress's power under Section 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment. Generally, Congress's decision that certain classes of aliens should be excluded or expelled from the country need be justified only by "a facially legitimate and bona fide reason." *Fiallo*, 430 U.S. at 794; see *Kleindienst* v. *Mandel*, 408 U.S. 753, 769-770 (1972). And Congress may plainly order the removal of aliens who are a threat to the safety and security of the country, including criminal aliens. See *Mulcahey* v. *Catalanotte*, 353 U.S. 692 (1957); *Lehmann* v. *United States ex rel. Carson*, 353 U.S. 685 (1957).

b. There is also no basis for petitioner's contention that, as a matter of constitutional principles of due process, he is entitled to an individualized consideration of whether the particular crime of which he was convicted is insufficiently serious to warrant his removal, or whether the particular facts and circumstances of his case warrant mitigation. As this Court has observed, the Attorney General's grant of discretionary relief from deportation is "an act of grace," akin to "a judge's

power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996). While petitioner does have a liberty interest in avoiding removal from the United States, that liberty interest is accorded constitutionally adequate due process by affording petitioner notice and an opportunity to contest the INS's charge of removability based on his criminal conviction, which was done in this case. The Constitution itself does not provide petitioner with any additional liberty interest or substantive right to contend that, even if he is removable based on his criminal conviction, he nonetheless should not be removed as a matter of discretion. Cf. *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 465 (1981).[7]

2. We also observe that the district court correctly concluded that it lacked subject matter jurisdiction over this case in light of 8 U.S.C. 1252(b)(9) (Supp, IV 1998). As the district court held (App., *infra*, 7a-9a), Section 1252(b)(9) requires that judicial review of all factual and legal issues arising out of a removal proceeding brought against an alien (to the extent that such judicial review is available) be had only by petition for review in the court of appeals. Accordingly, the district court did not have original jurisdiction, under

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[7] Petitioner briefly argues (Pet. 13-14) that the INS violated the court of appeals' order staying his removal by declaring him to be in breach of bond based on his failure to report to an INS officer under the terms of his bond agreement. The court of appeals' stay order, however, only prevented the INS from actually removing petitioner from the United States; it did not free petitioner from the conditions of his bond. It appears that the court of appeals reached a similar conclusion, as it denied petitioner's motion for sanctions. Pet. App. A8. That conclusion is correct and entirely factbound and therefore does not warrant further review.

28 U.S.C. 2241 or otherwise, to review petitioner's challenges to his removal order in this case.

There is presently a disagreement among the courts of appeals as to whether Section 1252(b)(9) divests the district courts of jurisdiction under Section 2241 to review challenges to removal orders brought by criminal aliens. Compare *Liang* v. *Reno*, Nos. 99-5053 et al., 2000 WL 264216, at *8-*13 (3d Cir. Mar. 9, 2000) (district courts do have jurisdiction) with *Max-George* v. *Reno*, No. 98-21090, 2000 WL 220502, at *8 (5th Cir. Feb. 24, 2000)(district courts do not have jurisdiction); see also *Richardson* v. *Reno*, 180 F.3d 1311, 1315 (11th Cir. 1999) (stating, in a case not involving a challenge to a final order of removal, that Section 1252(b)(9) divests the district courts of authority under 28 U.S.C. 2241 to review removal orders), cert. denied, No. 99-887 (Mar. 27, 2000). This case, however, does not present an appropriate vehicle for resolution of that issue, because the court of appeals' decision, which is unpublished, did not resolve that question. While the question whether the district courts have authority under 28 U.S.C. 2241 to review final orders of removal may eventually warrant this Court's resolution, that issue should be decided in a case in which it was resolved by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
ERNESTO H. MOLINA, JR.
Attorneys

APRIL 2000

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 99-1906 SBA

ARTURO ARIZAGA RAMOS, JR., PLAINTIFF

v.

DISTRICT DIRECTOR, DEFENDANT

[Filed: May 25, 1999]

ORDER DENYING PRELIMINARY INJUNCTION

On April 16, 1999, plaintiff Arturo Arizaga Ramos, Jr. ("Arizaga Ramos") filed this action, styled as a "complaint for habeas corpus relief," challenging an order of removal issued against him by the Immigration and Naturalization Service. Accompanying the complaint was an application for a temporary restraining order ("TRO"). After the government agreed to withhold execution of the removal order until June 2, 1999, the Court set a briefing schedule, with a hearing to follow. On further review, the Court finds this case suitable for decision without oral argument. *See* N.D. Cal. Civ. L.R. 7-1(b). Regarding the merits, the Court finds that plaintiff has neither raised serious questions nor shown a likelihood of success on the merits. Accordingly,

treating plaintiff's papers as a motion for preliminary injunction, the motion is DENIED.[8]

I. BACKGROUND

In June 1997, Arizaga Ramos received a Notice to Appear for "removal proceedings under section 240 of the Immigration and Naturalization Act ['INA']." (Admin. Rec. at 34.[9]) According to the notice, Arizaga Ramos is a citizen of Mexico who had been admitted to the United States, but who was subject to removal under section 237(a)(2)(A)(iii) of the INA because he had since been convicted of an "aggravated felony." (Admin. Rec. at 34.) Specifically, the notice charged that in May 1995 Arizaga Ramos had been convicted of possession of methamphetamine for sale, in violation of Cal. Health & Safety Code § 11378. (Admin. Rec. at 34.) Shortly after he received the Notice to Appear, Arizaga Ramos was released on $20,000 bail. (*See id.* at 32.)

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[8] Although plaintiff has moved only for a temporary restraining order, the present matter is appropriately treated as a motion for a preliminary injunction. Defendant has received notice and the Court has considered memoranda submitted by both sides. *See Viacom Int'l. Inc. v. FCC*, 828 F. Supp. 741, 743 & n.2 (N.D. Cal. 1993) (applying preliminary injunction standard to decide TRO application presented in same manner). Furthermore, it is clear from the papers that interlocutory injunctive relief is not appropriate in this case. *Cf. Religious Technology Center v. Scott*, 869 F.2d 1306, 1309 n.6 (9th Cir. 1989) (treating denial of TRO as a denial of preliminary injunction essentially because "the circumstances ma[d]e it unmistakably clear that the denial [was] tantamount to the denial of a preliminary injunction") (internal quotation omitted); *see also id.* at 1308-09.

[9] The Administrative Record is attached as an exhibit to the government's opposition papers filed May 11, 1999.

After a continuance of several months (*see* Admin. Rec. at 21, 22), the removal hearing was held on November 18, 1998 (*see id.* at 11, 21). At the hearing, it appears the government offered evidence of the drug conviction with which Arizaga Ramos was charged in the Notice to Appear. (*See id.* at 15 (abstract of judgment).) This evidence also showed that Arizaga Ramos had been convicted of receiving stolen property. (*See id.*; *see also id.* at 13-20 (other evidence related to plaintiff's two convictions).) The decision of the immigration judge ("IJ") following the hearing shows only that (1) Arizaga Ramos was ordered removed from the United States to Mexico; (2) his "application for cancellation of removal under section 240A(a) was . . . pretermitted,"[10] (3) a request for a further continuance was denied; and (4) any appeal was due by December 18, 1998. (*See id.* at 11.)

It appears that the immigration attorney for Arizaga Ramos mailed a notice of appeal to the Board of Immigration Appeals ("BIA") on December 14, 1998. (*See id.* at 6; *see also* Complaint ¶ 4.14.) However, the notice was not received by the BIA until December 21, 1998. Because the notice was untimely, the BIA eventually dismissed the appeal. (*See* Admin. Rec. at 2.) There is no indication that Arizaga Ramos petitioned for review before the United States Court of Appeals. However, he apparently has pending a motion to reopen before the BIA. (*See* Traverse at 2.)

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[10] At some point during the immigration proceedings, plaintiff apparently made an application for cancellation of removal, as provided for in section 240A of the INA, codified at 8 U.S.C. § 1229b. (*See* Complainit ¶ 4.12.) The contents of this application do not appear in the record.

Plaintiff filed this action on April 16, 1999. Accompanying the complaint was an application for a TRO. After the government agreed to withhold execution of the removal order until June 2, 1999, the Court set a briefing schedule. Pursuant to that schedule, the government filed its opposition to plaintiff's complaint on May 11, 1999, and plaintiff filed a traverse on May 18, 1999.

II. STANDARD OF REVIEW

The Court may grant a preliminary injunction where the movant demonstrates: "Either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in [the plaintiff's] favor." *American Tunaboat Ass'n v. Brown*, 67 F.3d 1404, 1411 (9th Cir. 1995) (citation omitted); *see also Viacom Int'l. Inc. v. FCC*, 828 F. Supp. 741, 743 & n.2 (N.D. Cal. 1993) (applying same two-prong test to TRO where defendants received notice of application and court considered briefs submitted by both sides). Under either prong of this test, the movant must "demonstrate a significant threat of irreparable injury, irrespective of the magnitude of the injury." *Big Country Foods, Inc. v. Board of Educ.*, 868 F.2d 1085, 1088 (9th Cir. 1989). Plaintiff must also demonstrate that there is no adequate remedy at law. *See Stanley v. University of So. Calif.*, 13 F.3d 1313, 1320 (9th Cir. 1994).

III. DISCUSSION

In his complaint, plaintiff contends he was denied effective assistance of counsel during the immigration proceedings. Specifically, he contends that immigration counsel failed to challenge on various constitutional

grounds the "automatic deportation" of aliens with green cards "without an evidentiary hearing based on conviction of an aggravated felony." *See* Complaint ¶ 5.2(a). Plaintiff also contends he was denied effective assistance of counsel when his attorney failed to file a timely notice of appeal to the BIA. *See id.* ¶ 5.2(b). An appeal was necessary, Arizaga Ramos asserts, in order to preserve the issues of whether retroactive application of the definition of an "aggravated felony" was unconstitutional and whether he had in fact been convicted of an "aggravated felony." *See id.* Finally, plaintiff contends that, regardless of whether his immigration attorney was ineffective, the "automatic[] remov[al] from the United States without a right to challenge the[] removal on any ground[] is unconstitutional." *See id.* ¶ 5.2(c).[11]

In support of these claims, plaintiff attaches a "brief" to his complaint. The TRO application accompanying the complaint also has a supporting memorandum attached, which is virtually identical to the brief accompanying the complaint.

The government opposes plaintiff's habeas petition and TRO request solely on the ground that this Court lacks jurisdiction. *See* Opp'n at 1. This argument will be addressed first.

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[11] As relief, plaintiff seeks an order requiring the INS to drop its "hold" against plaintiff, "[q]uash[ing] the Immigration Court's removal order[] pending a hearing on the merits," and declaring "that th[e] portion of the Immigration laws . . . requiring automatic removal of lawfully admitted resident aliens upon a conviction of an 'aggravated felony' without an evidentiary hearing [is] unconstitutional." Complaint at 6.

A. Jurisdiction

The government relies on two relatively new provisions, 8 U.S.C. § 1252(b)(9) and (g), to assert that this Court lacks jurisdiction. These statutory provisions were added by section 306(a)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, -610, -612. The provisions are fully applicable here because the INS initiated proceedings against Arizaga Ramos on or after April 1, 1997. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997) ("IIRIRA's permanent provisions pertain to removal proceedings initiated by the INS on or after April 1, 1997").

The government first contends that jurisdiction in this Court is barred by 8 U.S.C. § 1252(g). *See* Opp'n at 2-6. This statute reads as follows:

> EXCLUSIVE JURISDICTION.—Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

IIRIRA, 110 Stat. 3009-612, codified at 8 U.S.C. § 1252(g). The Supreme Court recently interpreted this provision in *Reno v. American-Arab Anti-Discrimination Committee*, 119 S. Ct. 936 (1999). In *Reno*, the Court ruled that section 1252(g) is concerned with, and precludes, collateral attacks on the Attorney General's exercise of prosecutorial discretion in deciding whether to initiate or continue immigration proceedings and

whether to execute removal orders that have been issued through such proceedings. *See id.* at 943-45. Applying this interpretation to the case before it, the Court held that the statute barred a district court lawsuit challenging the Attorney General's decision to initiate deportation proceedings—even though the challenge was based on a theory that the decision violated the First Amendment because the aliens were targeted for deportation based on their expression of political views. *See id.* at 945; *see also id.* at 939.[12]

The Court in *Reno* repeatedly noted its "narrow" interpretation of section 1252(g). *See id.* at 943, 945. The government therefore overstates the law's effect by asserting that the statute "broadly preclud[es] aliens from challenging the legality of their deportation or exclusion proceedings outside the context of the streamlined judicial review scheme established by Congress." Opp'n at 3:1-3. Instead, "[t]he provision applies only to three discrete actions that the Attorney General may take[,] [including] her 'decision or action' to '. . . execute removal orders.'" *Id.* at 943. "It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings." *Id.* Here, plaintiff is contesting the validity of the removal order issued against him, rather than challenging any discretionary aspect of the Attorney General's imminent decision to execute the order.

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[12] Acknowledging that the plaintiffs could not raise their constitutional claims during immigration proceedings, the Court concluded that plaintiffs' constitutional claims were simply not cognizable. *See* 119 S. Ct. at 945-47.

Section 1252(g) therefore does not bar this Court's jurisdiction over the case.

The government also relies on section 1252(b)(9) to show that this Court lacks jurisdiction. *See* Opp'n at 6-8. That section reads as follows:

> CONSOLIDATION OF QUESTIONS FOR JUDICIAL REVIEW.—Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section.

IIRIRA, 110 Stat. 3009-610, codified at 8 U.S.C. § 1252(b)(9). In the *Reno* case, the Supreme Court suggested this statute would have a broad effect on the jurisdiction of the federal courts over future immigration cases. *See* 119 S. Ct. at 943 (describing statute as an "unmistakable 'zipper' clause," which happened not to apply to the pending case because of the date the INS initiated deportation proceedings). Under the statute (which fully applies to this case, given the date the government initiated removal proceedings), the only avenue of judicial review expressly provided for in section 1252 that might pertain to Arizaga Ramos's case is a petition to the Court of Appeals for direct review of the removal order issued against him. *See* 8 U.S.C. § 1252(a)(1), (b)(2). Therefore, as applied to the present case, section 1252(b)(9) divests this Court of jurisdiction.

Plaintiff advances two bases for jurisdiction, but neither is persuasive. First, plaintiff cites to 8 U.S.C.

§ 1105a(a)(8) & (10) as conferring habeas jurisdiction over immigration maters. *See* TRO Application at 3. Section 1105a was repealed by IIRIRA § 306(b). Accordingly, at pages 2-3 of his traverse, plaintiff withdraws his citation to section 1105a and instead cites to 8 U.S.C. § 1252(e)(2) & (3). However, these laws govern review of the summary removal procedures under section 235 of the INA. Because the government has sought to remove plaintiff under section 240, not section 235, these provisions are irrelevant here.[13]

Because the Court lacks jurisdiction, the request for preliminary injunctive relief is denied on this basis. However, even if the Court has jurisdiction, the request is also denied on the merits for the following additional reasons.[14]

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[13] For the same reason, the request set out at page 6 of plaintiff's traverse to have this case transferred to the District of Columbia is denied. The provision on which the request is apparently based, 8 U.S.C. § 1252(e)(3)(A), may require proceedings to be held in the District of Columbia, but the statute only pertains to challenges to removal under section 235.

[14] The Court recognizes that in *Reno* the Supreme Court left open the question whether habeas review of immigration proceedings remains available after IIRIRA. *See id.* at 942 n.7 (noting split in circuits). However, the Ninth Circuit decisions in point have been withdrawn or vacated, *see Magana-Pizano v. INS*, 119 S. Ct. 1137 (1999) (vacating lower court decision and remanding for reconsideration in light of *Reno*); *Hose v. INS*, 161 F.3d 1225 (9th Cir. 1998) (order withdrawing panel opinion and granting rehearing en banc), and the parties have provided no argument on the matter.

B. Merits

Plaintiff's complaint raises essentially three challenges to the removal order pending against him: First, that the "automatic deportation" of aliens with green cards "without an evidentiary hearing based on conviction of an aggravated felony" is unconstitutional, *see* Complaint ¶¶ 5.2(a), (c); second, that retroactive application of the definition of an "aggravated felony" is unconstitutional, *see id.* ¶ 5.2(b); and—third—that he has not been convicted of an "aggravated felony" requiring his removal from the United States, *see id.* None of these claims raises serious questions nor a likelihood of success on the merits.[15]

1. "Automatic Deportation"

Plaintiff alleges various constitutional violations based on his belief that, under IIRIRA, aliens with green cards are "automatically" subject to deportation

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[15] Plaintiff also contends he was denied effective assistance of counsel when his immigration attorney failed to file a timely notice of appeal to the BIA. *See* Complaint ¶ 5.2(b). However, to show ineffective assistance of counsel in immigration proceedings, an alien must show prejudice resulting from the alleged ineffectiveness. *See Mohsseni Behbahani v. INS*, 796 F.2d 249, 251 (9th Cir. 1986). The grounds on which Arizaga Ramos claims prejudice are set out in the text here. Because plaintiff fails to raise a serious question regarding the merits of any of these claims, he cannot show any prejudice and therefore he cannot succeed on a claim of ineffective assistance of counsel—even if the Court were to adjudge his immigration counsel's performance deficient. In any event, plaintiff offers no evidence regarding whether a competent immigration attorney would or would not have relied on the mail to deliver a notice of appeal in a timely manner under the circumstances in this case.

"without an evidentiary hearing based on conviction of an aggravated felony." *See* Complaint at ¶ 5.2(a), (c); *see also id.* at 9-11. This claim is meritless. Plaintiff appears to be referring to procedures under section 240 (which he erroneously refers to as section 240A) of the INA that were added by IIRIRA § 304(a)(3), 110 Stat. 3009-589 to -593, and which are codified at 8 U.S.C. § 1229a. These are the procedures under which the INS initiated removal proceedings against Arizaga Ramos. *See* Admin. Rec. at 34. Contrary to plaintiff's assertions, the procedures under this section contemplate an evidentiary hearing. *See* 8 U.S.C. § 1229a(b)(1) ("[t]he immigration judge shall . . . receive evidence"), (4)(B) (conferring rights on alien to present evidence and to cross-examine government witnesses). Indeed, in plaintiff's own case, a hearing was held and, it appears, evidence of his prior convictions was considered. *See* Admin. Rec. at 11-21.[16]

Apart from section 240, there are procedures under IIRIRA by which aliens just arriving in the United States may be removed without a hearing. *See* IIRIRA § 302(a) (amending section 235 of Immigration and Naturalization Act, as codified at 8 U.S.C. § 1225).

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[16] Plaintiff also contends that, at the time he was released on parole from the 1995 state conviction, "there was an INS hold for deportation under 8 U.S.C. § 240A(a) [sic], that requires automatic deportation for persons having an aggravated felony . . . without benefit of a hearing." *See* Complaint ¶ 4.11. Aside from his sworn statement, plaintiff offers no evidence of such a "hold." Furthermore, the existence of such a "hold" is unlikely since the INS did in fact initiate formal removal proceedings against plaintiff. *See* Admin. Rec. at 34. And even if such a "hold" existed, it likely does not affect the plaintiff because he was admitted to bail. *See id.* at 32.

However, plaintiff here neither refers to this specific portion of the statute, nor does he have standing to challenge it.

Instead of attacking immigration procedures, plaintiff actually appears to be complaining about Congress's decision that a single aggravated felony is sufficient to require the removal of an alien who is otherwise lawfully present in the United States. However, Congress has plenary authority over immigration matters. *See, e.g., United States v. Hernandez-Guerrero*, 147 F.3d 1075, 1076 (9th Cir.) (noting that Congress's inherent power over immigration has been described as "plenary" and "sweeping"), *cert. denied*, 119 S. Ct. 433 (1998). Plaintiff's complaint therefore is a matter to be addressed to Congress, not the courts.

Plaintiff also argues that it violates equal protection to remove from the country aliens convicted of aggravated felonies, but not citizens so convicted. *See* Complaint at 8. This argument does not appear to relate to claims stated in the formal complaint; in any event, it is meritless. As the Second Circuit noted in rejecting virtually the same argument, "[d]eportation is not a remedy available against citizens but rather is an implementation of Congress' power to exclude." *Santelises v. INS*, 491 F.2d 1254, 1256 (2d Cir. 1974) (per curiam). Furthermore, any distinction drawn by the immigration laws has a rational basis in reducing the risk and effects on this country of recidivism. *Cf. id.* (deporting aliens convicted of misusing immigration documents had rational basis of maintaining integrity of immigration system). In addition, the Second Circuit's summary rejection of a claim that deportation is cruel and unusual punishment, *see id.* at 1255-56, addresses

Arizaga Ramos's allegation that removal "is in reality a form of impermissible constructive banishment." Complaint at 9; *see also* Traverse at 8 (referring to "cruel and unusual punishment").

Plaintiff also cites to several cases regarding detention of aliens pending removal or deportation. *See* Complaint at 8. However, these cases are not relevant here, as plaintiff was admitted to bail. *See* Admin. Rec. at 32. Plaintiff also relies on capital cases prohibiting mandatory imposition of the death penalty, apparently to support an argument that conviction of an aggravated felony alone cannot be a sufficient ground in itself to require deportation. *See* Complaint at 9; Traverse at 6-7. Death is different, however, and these cases have no bearing here. *See, e.g., Edelbacher v. Calderon*, 160 F.3d 582, 585 (9th Cir. 1998) ("The Supreme Court has repeatedly held that the death penalty is quantitatively different from all other punishments and that the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error.")

Finally, plaintiff claims that "the [Immigration] Court and the Board of Appeals refused Plaintiff an opportunity to argue the correct application of the law." Complaint at 10. Similarly, plaintiff asserts that "the need to remove has not been litigated." *Id.* at 11. The record shows, however, that a hearing was noticed for and apparently held on November 18, 1998. *See* Admin. Rec. at 11, 21. Furthermore, plaintiff had the option of appealing to the BIA, although he failed to do so in a timely manner. Thus, plaintiff had ample opportunity to present his arguments. In fact, he offers absolutely

no evidence that he was prevented from doing so, at least before the Immigration Judge.[17]

At bottom, plaintiff is aggrieved by the fact that his prior conviction for an "aggravated felony" prevented him from raising during the immigration proceedings any equities regarding his removal from the country. As stated above, this grievance must be addressed to Congress.

2. Retroactive Application of "Aggravated Felony" Definition

Arizaga Ramos claims (with virtually no supporting argument) that retroactive application of the definition of an "aggravated felony" to his case violates due process and the Ex Post Facto Clause. *See* Complaint ¶ 5.2(b)(1), (2). His claim, in essence, is that the conviction on which the INS has based its removal order was rendered in 1995, but Congress did not make

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[17] Plaintiff complains that the IJ "pretermitted" his application for cancellation of removal. *See* Complaint ¶ 4.13. However, this does not mean the IJ did not consider the application. Instead, the IJ acted within her authority when she summarily rejected the application because, as an alien convicted of an aggravated felony, Arizaga Ramos is not eligible for the discretionary relief of cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3); *cf. INS v. Bagamasbad*, 429 U.S. 24 (1976) (per curiam) (INS may pretermit issue of eligibility for discretionary relief by simply denying relief as a matter of discretion). While plaintiff claims that the IJ also pretermitted the constitutional issues he sought to raise, *see* Traverse at 4, the record shows only pretermission of the issue regarding cancellation of removal. *See* Admin. Rec. at 11. In any event, as discussed in this order, plaintiff's constitutional claims lack merit.

plaintiff's conviction an "aggravated felony" under the immigration laws until later.[18]

A similar claim was discussed in *Tam v. Reno*, No. C-98-2835 MHP, 1999 WL 163055 (N.D. Cal. Mar. 22, 1999) (Patel, C.J.). In *Tam*, the alien claimed a denial of due process based on the fact that IIRIRA had changed the effect of his prior conviction and thereby removed his eligibility for a discretionary waiver of deportation. The court described the issue presented in broad terms: "whether Congress intended [IIRIRA] to retroactively apply to criminal convictions that occurred before April 24, 1996, although the INS initiated removal proceedings after April 1, 1997." *Id.* at *8. Similarly, in the present case, Arizaga Ramos was found deportable in removal proceedings initiated after April 1, 1997, based on a 1995 conviction which Congress had only later deemed an "aggravated felony." Under such circumstances, the *Tam* court concluded that, while IIRIRA applied to convictions rendered before the statute was enacted, this was not an impermissible "retroactive" application of the law. *See id.* *7-*11.

After canvassing relevant authority, the *Tam* court followed a Ninth Circuit decision in reaching its conclusion. *See id.* at *10-*11. In the Ninth Circuit case,

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[18] Plaintiff does not show when Congress made his prior conviction an "aggravated felony" for purposes of the immigration laws. While the timing of these events matters for purposes of plaintiff's constitutional claim, it clearly does not matter for purposes of deciding whether a prior conviction meets the statutory definition of an "aggravated felony." Under IIRIRA § 321(b), codified at 8 U.S.C. § 1101(a)(43) (last paragraph), the term "applies regardless of whether the conviction was entered before, on, or after September 30, 1996."

the court held that an alien's 1986 convictions were effective under a 1988 statute to bar the alien's 1993 application for discretionary relief from deportation. *See Samaniego-Meraz v. INS*, 53 F.3d 254, 256-57 (9th Cir. 1995). In so holding, the court concluded that the 1988 federal statute did not have a "retroactive" effect. *See id.* at 256. Following this ruling, the *Tam* court concluded that IIRIRA could alter the consequences of a pre-existing conviction without violating due process. *See Tam*, 1999 WL 163055, at *11. The same rationale applies here to show that Arizaga Ramos's claims regarding alleged "retroactive" application of IIRIRA fails to raise a serious question.

3. Status of Plaintiff's Prior Conviction

Finally, plaintiff asserts (again, with little supporting argument) that he was not convicted of an "aggravated felony." *See* Complaint ¶ 5.2(b). To be removable under the statute cited in the Notice to Appear served on plaintiff, an alien must be convicted of an "aggravated felony." *See* 8 U.S.C. § 1227(a)(2(A)(iii) (codifying section 237(a)(2)(A)(iii) of the INA); *see also* Admin. Rec. at 34 (citing section 237 of the INA). The term "aggravated felony" includes "a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B). In turn, section 924(c)(2) states that "the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.)," among other crimes. To apply these definitions, section 1101(a)(43) of title 8 notes, in its last paragraph, that "[t]he term ['aggravated felony'] applies to an offense described in this [subsection] whether in violation of Federal or State law . . . ." In analyzing whether a state conviction is an

"aggravated felony" under section 1101(a)(43), courts take a "categorical approach" by looking at the statutory definition of the crime and considering "whether the full range of conduct encompassed by [the statute] constitutes an aggravated felony." *United States v. Lomas*, 30 F.3d 1191, 1193 (9th Cir. 1994).

In the present case, the statutory definition for the crime of which Arizaga Ramos was convicted in 1995 states in pertinent part that "every person who possesses for sale any controlled substance . . . shall be punished by imprisonment in the state prison." Cal. Health & Safety Code § 11378. A state conviction under section 11378 necessarily means that the defendant possessed a controlled substance with intent to distribute, in violation of 21 U.S.C. § 841(a). *Compare* CALJIC 12.01 (6th ed. 1996) (stating that elements of crime of possession for sale include knowing exercise of control over substance "with the specific intent to sell the same") *with United States v. Cain*, 130 F.3d 381, 382 (9th Cir. 1997) (summarizing elements of federal crime as "knowing possession . . . with intent to distribute"), *cert. denied*, 118 S. Ct. 1333 (1998). The quantity possessed is irrelevant for purposes of conviction under section 841(a). *See United States v. Brinton*, 139 F.3d 718, 723 (9th Cir. 1998).

Arizaga Ramos's conviction was for possession for sale of methamphetamine. *See* Admin. Rec. at 17. By possessing methamphetamine with intent to distribute, Arizaga Ramos violated section 841(a) and was at least subject to a maximum term of imprisonment of 20

years. *See* 21 U.S.C. § 841(b)(1)(C).[19] Plaintiff was thus convicted of a "felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.)" and, therefore, of an "aggravated felony" within the meaning of 8 U.S.C. § 1101(a)(43). Accordingly, the INS properly charged Arizaga Ramos with being removable based on a conviction for an "aggravated felony." *Cf. Haroutunian v. INS*, 87 F.3d 374, 375 & n.2 (9th Cir. 1996) (referring to conviction under 21 U.S.C. § 841(a) for possession of heroin with intent to distribute as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)).

IV. CONCLUSION

Because Arizaga Ramos has not raised serious questions regarding the merits of his case, the balance of hardships is not legally relevant. Accordingly, the request for interlocutory injunctive relief is hereby DENIED.

In order to expedite any appeal and related stay application, the Court now declines to exercise its authority under Federal Rule of Civil Procedure 62(c) to issue a stay pending appeal, and will not entertain a further motion for a stay pending appeal. The Court's reasons for doing so are the same as the reasons stated in support of the foregoing decision. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir.) ("The standard for evaluating stays pending appeal is similar to that

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[19] As it was, Arizaga Ramos's California conviction subjected him to a possible term of imprisonment of two, three, or four years. *See* Cal. Health & Safety Code § 11351; *see also Lomas*, 30 F.3d at 1194. It appears he received a two-year term. *See* Admin. Rec. at 15.

employed by district courts in deciding whether to grant a preliminary injunction."), *stay granted*, 463 U.S. 1328 (1983). Any application for a stay pending appeal should be directed to the appellate court. *See* Fed. R. App. P. 8(a)(2).

IT IS SO ORDERED.

DATED: May 25, 1999

\s\ SAUNDRA B. ARMSTRONG
SAUNDRA BROWN ARMSTRONG
United States District Judge

APPENDIX B

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A35 581 469 - San Francisco Date: MAR 12 1999

In re: ARTURO ARIZAGA-RAMOS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael P.
Karr, Esquire

ORDER:

PER CURIAM. The appeal is untimely. A Notice of Appeal (Form EOIR-26) must be filed within 30 calendar days of an Immigration Judge's oral decision or the mailing of a written decision. In the instant case, the Immigration Judge's decision was rendered orally on November 18, 1998. The appeal was accordingly due on or before December 18, 1998. The record reflects, however, that the Notice of Appeal was filed with the Board of Immigration Appeals on December 21, 1998. We find that the appeal is untimely. The Immigration

Judge's decision is accordingly now final, and the record is returned to the Immigration Court without further action. See 8 C.F.R. §§ 3.3(a), 3.38, 236.7, and 242.21 (1997).

SIGNATURE ILLEGIBLE
FOR THE BOARD

APPENDIX C

(seal omitted) **U.S. Department of Justice**

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

LARRY SHANAHAN
615 WOODSIDE ROAD
REDWOOD CITY, CA 94061

FILE: A35 581 469 — Office: San Francisco
Date: SEP 30 1999

IN RE: Obligor: LARRY SHANAHAN
Bonded Alien: ARTURO ARIZAGA-RAMOS

IMMIGRATION BOND: Bond Conditioned for the Delivery of an Alien under § 103 of the Immigration and Nationality Act, 8 U.S.C. 1103

IN BEHALF OF OBLIGOR:

JAMES JOSEPH LYNCH, JR.
2740 HOWE AVENUE
SACRAMENTO, CA 95812-0336

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires my be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

\s\ SIGNATURE ILLEGIBLE
for Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The delivery bond in this matter was declared breached by the Acting District Director, San Francisco, California, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The record indicates that on June 20, 1997, the obligor posted a $20,000 bond conditioned for the delivery of the above referenced alien. A Notice to Deliver Alien (Form I-340) dated May 6, 1999, was sent to the obligor via certified mail, return receipt requested. The notice demanded the bonded alien's surrender to the Immigration and Naturalization Service (the Service) for removal at 9:30 a.m. on June 1, 1999, at 630 Sansome Street, Room 113, San Francisco, CA 94111. The obligor failed to present the alien, and the alien failed to appear as required. On June 16, 1999, the acting district director informed the obligor that the delivery bond had been breached.

On appeal, counsel asserts that the obligor reasonably believed that the alien's removal had been cancelled based on an appeal filed with the Ninth Circuit Court.

8 C.F.R. 241.6 provides in pertinent part that neither the request for a stay of deportation or removal or the failure to receive notice of disposition of the request shall delay removal or relieve the alien from strict compliance with any outstanding notice to surrender for deportation or removal.

Delivery bonds are violated if the obligor fails to cause the bonded alien to be produced or to produce himself/herself to an immigration officer or immigration judge, as specified in the appearance notice, upon each and

every written request until removal proceedings are finally terminated, or until the said alien is actually accepted by the Service for detention or removal. *Matter of Smith*, 16 I&N Dec. 146 (Reg. Comm. 1977).

The regulations provide that an obligor shall be released from liability where there has been "substantial performance" of all conditions imposed by the terms of the bond. 8 C.F.R. 103.6(c)(3). A bond is breached when there has been a substantial violation of the stipulated conditions of the bond. 8 C.F.R. 103.6(e).

8 C.F.R. 103.5a(a)(2) provides that personal service may be effected by any of the following:

> (i) Delivery of a copy personally;
>
> (ii) Delivery of a copy at a person's dwelling house or usual place of abode by leaving it with some person of suitable age and discretion;
>
> (iii) Delivery of a copy at the office of an attorney or other person including a corporation, by leaving it with a person in charge;
>
> (iv) *Mailing a copy by certified or registered mail, return receipt requested, addressed to a person at his last known address.*

(Emphasis supplied.) The bond (Form I-352) provides in pertinent part that the obligor "agrees that any notice to him/her in connection with this bond may be accomplished by mail directed to him/her at the above address." In this case, the Form I-352 listed 615 Woodside Road, Redwood City, CA 94061 as the obligor's address.

Contained in the record is a certified mail receipt which indicates that the Notice to Deliver Alien was sent to the obligor at 615 Woodside Road, Redwood City, CA 94061 on May 6, 1999. This notice demanded that the obligor produce the bonded alien for removal on June 1, 1999. The receipt also indicates the obligor received notice to produce the bonded alien on May 18, 1999. Consequently, the record clearly establishes that the acting district director properly served notice on the obligor in compliance with 8 C.F.R. 103.5a(a)(2)(iv).

Furthermore, it is clear from the language used in the bond agreement that the obligor shall cause the alien to be produced or the alien shall produce himself to a Service officer upon each and every request of such officer until removal proceedings are either finally terminated or the alien is accepted by the Service for detention or removal.

It must be noted that delivery bonds are exacted to insure that aliens will be produced when and where required by the Service for hearings or removal. Such bonds are necessary in order for the Service to function in an orderly manner. The courts have long considered the confusion which would result if aliens could be surrendered at any time or place it suited their or the surety's convenience. *Matter of L-*, 3 I&N Dec. 862 (C.O. 1950).

After a careful review of the record, it is concluded that the conditions of the bond have been substantially violated, and the collateral has been forfeited. The decision of the acting district director will not be disturbed.

ORDER: The appeal is dismissed.

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Supreme Court, U.S.
FILED
APR 12 2000
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(3)

CASE # 99-1259

In The Supreme Court Of The United States

ARTURO ARIZAGA RAMOS,

PETITIONER,

v.

DISTRICT DIRECTOR, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF IMMIGRATION JUDGE

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY

JAMES JOSEPH LYNCH, JR
ATTORNEY AT LAW SBN 85805
2740 HOWE AVE.
P. O. BOX 336
SACRAMENTO, CA 95812-0336
OFFICE: (916) 448-7871
FAX: (916) 448-0549

COUNSEL FOR PETITIONER
ARTURO ARIZAGA RAMOS

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RESPONDENT

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PETITIONER'S REPLY

STATEMENT IN REPLY

1. In many respects, petitioner agrees with the Statement of the Respondent, however, Respondent has omitted a number of material legal issues and facts and for that reason, uses this opportunity to bring them to this court's attention.

a. At page three, Respondent omits, or fails to disclose that **no appeal, review, or habeas corpus** is available on a finding that an alien has suffered an "aggravated felony. See IIRAIRA § 304(a)(3), creating INA § 240a(C); 8 U.S.C., § 1252(a)(2)(C).. (Pet. P. 2.)

b. At page 4, Respondent omits the fact that at the time of entry, Petitioner was only 5 years old, that he is currently married to an American citizen, and that his entire family resides in the United States. Pet., p. 4.

c. At page 4, Respondent also correctly points out that the district court dismissed for lack of jurisdiction under § 1252(b)(9), but fails to point out that the district court in this case lacked jurisdiction under 8 U.S.C., §

1252(a)(2)(C), because the Hobbs Act is not available to Petitioner in view of his status as an aggravated felon, and it is this section that Petitioner challenges under general habeas corpus rules. U.S. Const., Art. I, § 9; 28 U.S.C., § 2241.[1]

d. The Respondent points out the ruling of the District Court accurately, but fails, or omits, to state that the court never addressed the issues raised by Petitioner: Can Congress make deportation **mandatory** without regard to the particularized facts of the case; can Congress deny aliens convicted of an "aggravated felonies" access to the court do challenge IIRAIRA and the provisions which Petitioner believes objectionable.

e. Respondent, at p. 6, correctly points out that the court "further ruled that petitioner ... had the opportunity to appeal to the BIA ...." This omits the fact that while Petitioner had the opportunity, his issues were pretermitted by Respondent, Pet. App. p. A11, the law bars discretionary cancellation, and bars judicial review of any kind, hence the fact of failure to file a timely administrative appeal is not relevant.

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[1] Petitioner's initial pleading was denominated "COMPLAINT FOR HABEAS CORPUS RELIEF; ...." It alleged jurisdiction under, among other sections, "29 (sic) U.S.C. § 1651 (sic) ... Art. I, § 9, 1st .... Amendment ... " 28 U.S.C., § 2241 appears to be limited to prisoner cases. Defective allegations of jurisdiction may be amended, on terms, in the trial or appellate courts. 28 U.S.C., § 1653. Neither the courts below nor Respondent appear to have been misled by the citation. E.g., Respondent framed the issue citing 28 U.S.C., 2241. Respondent, p. (I). A subsidiary issue is whether the District Court had jurisdiction under the All Writs Act, 28 U.S.C., § 1651 in view of U.S. Const., Art. I, § 9 (Habeas Corpus) & 1st Amendment Right to Petition for redress of grievances.

ARGUMENT IN REPLY

1. Respondent casts Petitioner's claims as a denial of equal protection of the laws. Respondent, p. 8-9.

a. Petitioner has never claimed denial of equal protection of the laws because, obviously, citizens cannot be deported. Petitioner has claimed, based on precedent from this court, that he has procedural and substantive due process claims and that Congress stepped over the line in **mandating** deportation of "aggravated felons" regardless of the facts, or impact on family, denying "aggravated felons" access to the courts to challenge both the act and the deportation, in the right case. Pet., p. 12.

b. Respondent claims that "discretionary relief is "an act of grace."" Respondent, p. 10. This court has held that while there may be discretion, discretion may be directed in a particular manner, such that denial of discretion in the manner specified amounts to a denial of due process of law. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 11-12 (1979) [Expectation exists[2]]; *Board of Pardons v. Allen*, 482 U.S. 369 (1987) [Expectation exists[3]]. In this case, there are family rights to association to

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[2] Nebraska Revised Statues § 83-1,114(1)(1981): "Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it *shall* order his release unless it is of the opinion that his release should be deferred because: (a) There is substantial risk that he will not conform to the conditions of parole; (b) His release would depreciate the seriousness of his crime or promote disrespect for law; (c) His release would have a substantially adverse effect on institutional discipline; or (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date"

[3] Montana Code Annotated: "Prisoners eligible for parole. (1) Subject to the following restrictions, the board *shall* release on parole . . .

be considered, and while petitioner's rights may be diminished in some respect, there are others with their rights fully in tact. *Procunier v. Martinez*, 416 U.S. 396 (1978) (1st Amendment; Communications; Family Rights).

2. Respondent claims that the district court found that is had no jurisdiction, and rightly denied the petition for habeas corpus, conceding there is a conflict with other circuits. Respondent, pp. 11-12. This case in fact does present the vehicle for review of these issues because of the suspension of habeas corpus relief to a segment of persons who might well be entitled to relief, but denied access to the courts because of the label "aggravated felon." Furthermore, even in *Reno v. American-Arab Anti-Discrimination Committee*, 42 L.Ed.2d 929 (1999), distinguishable on the facts, this court held that legal resident aliens did have due process rights. This case presents issues relating to the scope of those due process rights. Pet. P. 15.

The following case relied upon by the panel overlooks or ignores an important principal of constitutional law:

CONCLUSION

WHEREFORE, Petitioner prays, for all, or any one of, the foregoing reasons, this court grant the writ of *certiorari* to the Ninth circuit, and summarily reverse and remand, or set the matter for briefing and argument.

Dated: April 12, 2000

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any person confined in the Montana state prison or the women's correctional center . . . when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community[.] (2) A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen."

RESPECTFULLY SUBMITTED,

JAMES JOSEPH LYNCH, JR
ATTORNEY AT LAW SBN 85805
2740 HOWE AVE.
P. O. BOX 336
SACRAMENTO, CA 95812-0336
OFFICE: (916) 448-7871
FAX: (916) 448-0549

ATTORNEY FOR PETITIONER